

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

WEDNESDAY, THE 7TH NOVEMBER 2007 / 16TH KARTHIKA 1929

FAO.No. 154 of 2007()

AS.21/2004 of SUB COURT,ATTINGAL

APPELLANT/PETITIONER

**SOUTH BEEVI,
KAVUNGAL HOUSE, EDAVA DESOM, EDAVA VILLAGE,
THIRUVANANTHAPURAM DISTRICT.**

BY ADV. SRI.R.ANILKUMAR

RESPONDENTS: R1/COUNTER PETITIONER/APPELLANT IN AS

- 1. SUHARA BEEVI, D/O. HAJIRA UMMAL,
THARAVILA VEEDU, EDAVA VILLAGE AND DESOM,
EDAVA P.O., TRIVANDRUM.**
- 2. MUHAMMED ZAKIR, D/O. HAJIRA UMMAL,
THARAVILA VEEDU, EDAVA VILLAGE AND DESOM,
EDAVA P.O., TRIVANDRUM.**
- 3. SALEENA, D/O. HAJIRA UMMAL,
THARAVILA VEEDU, EDAVA VILLAGE AND DESOM,
EDAVA P.O., TRIVANDRUM.**
- 4. SAJEENA, D/O. HAJIRA UMMAL,
THARAVILA VEEDU, EDAVA VILLAGE AND DESOM,
EDAVA P.O., TRIVANDRUM.**

**BY ADV. SRI.VAKKOM N.VIJAYAN
SRI.R.SURESH
SMT.VINITHA PRASANNAN
SRI.A.S.SACHIN**

**THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD
ON 07/11/2007, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

K.PADMANABHAN NAIR, J.

F.A.O.No.154 of 2007

Dated this the 7th November, 2007.

J U D G M E N T

First petitioner in I.A.No.806/06 in A.S.No.21/2004, on the file of the Sub Court, Attingal, is the appellant herein. The appellant and respondents 2 to 4 filed O.S.No.299/1990, on the file of the Munsiff's Court, Varkala, for partition. A preliminary decree was passed which was followed by a final decree also. Appellant, plaintiff in the suit, filed E.P.No. 63/2004 for delivery of the property and also for quantification of owelty amount. The first respondent-defendant filed A.S.No.21/2004 challenging the final decree passed in that case. In that appeal, appellant filed I.A.No.806/2006 for an order of temporary injunction restraining the respondents from trespassing into the suit property, on the ground that the Amin had already effected delivery on 16.6.2005. That application was resisted by the first respondent contending that on 11.7.2005, the lower appellate court, stayed the execution. It was also contended that Amin never visited the property and filed a false report to the effect that he effected delivery on 16.6.2005. The delivery list is only a paper delivery. It was also contended that she filed E.A.No.104/2005 before the Executing Court

for a declaration that no delivery was effected. The lower appellate court took a view that in view of the order passed on 11.7.2005, staying the execution, the same will sustain. The lower appellate court also noted the contention of the respondent that she is in possession of the property and dismissed the injunction order. Challenging that order, this appeal is filed.

2. The suit was filed in the year 1990. E.P.63/2004 was filed for delivery of the plot allotted to the appellant and also for recovery of owelty amounts. Appeal was filed on 16.2.2004. The appeal was admitted on 23.4.2004. The lower appellate court did not pass ex parte order of stay and notice was ordered. On 11.7.2005, after hearing both sides, stay order was passed. The case of the appellant is that prior to the order dated, 11.7.2005, Amin effected delivery on 16.6.2005, and filed a report to that effect. The respondent had filed E.A.No.104/2005 for setting aside the Amin's report. The lower appellate court has not considered whether delivery had been actually effected or not, but it took a view that in view of the

order passed on 11.7.2005, the entire execution must be deemed to have been stayed. I do not think that the view adopted by the lower appellate court is correct or reasonable.

3. The crucial question to be considered is whether the contention of the respondent that actual delivery was effected is true or false. If as a matter of fact, delivery was effected, the appellants are entitled to an order of injunction. In case the first respondent ultimately succeeds in this appeal, she is entitled to apply for restitution. So, I am of the view that the Executing Court shall consider E.A.No.104/2005 filed by the respondent and take a decision as to whether the delivery was effected or not, as expeditiously as possible, at any rate, within one month from the date of production of a copy of this judgment before that court.

4. After disposal of that E.A., it is open to the appellant to move the appellate court again for an order of injunction, provided, the Executing Court finds that actual delivery was effected. I make it clear that the order passed in I.A.No.806/2006 in A.S.No.21/2004 will not be a bar for the plaintiffs to move an application for injunction.

5. The stay order passed by the lower appellate court is modified to the extent of permitting the Executing Court to consider whether actual delivery had been effected or not.

F.A.O. is disposed of as above.

**K.PADMANABHAN NAIR,
JUDGE**

nj.